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Supreme Court of the United States

OCTOBER TERM, 1946

No. 1224

THE MOTOR HAULAGE COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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Statement

Pursuant to Rule 12, paragraph 3, and Rule 7, paragraph 3, of the Revised Rules of the Supreme Court, appellant submits this brief in opposition to the motions of appellees to affirm the decree of the District Court; namely, the joint motion of the United States and the Interstate Commerce Commission and the separate motion of the Regular Common Carrier Conference of the American Trucking Asociations, Inc., which, however, rests upon the arguments advanced by the United States and the Commission.

This suit was brought by appellant seeking a review of and a decree setting aside, annulling and enjoining enforcement of a decision and order of the Interstate Commerce Commission. The proceeding before the Commission was had upon the application of appellant for the issuance to it,

under the provisions of the so-called "grandfather" clause of Section 209 of Part II of the Interstate Commerce Act, of a permit authorizing it to continue to engage in transportation as a contract carrier of property by motor vehicle in interstate commerce. The decision and order of the Commission were upheld by the District Court, which entered a decree dismissing appellant's petition. Direct appeal has been taken to this Court in accordance with the provisions of U.S.C., Title 28, Section 47a. The three judges comprising the statutory district court certified to the possibility of reasonable doubt as to the correctness of their decision and granted an interlocutory injunction, which has been extended by Mr. Justice JACKSON pending the appeal and determination thereon or until further order of this Court.

The jurisdiction of this Court to entertain and hear the appeal is not contested by appellees. It is clearly set forth in appellant's jurisdictional statement and rests upon the statutory provisions there referred to. However, appellees have filed motions to affirm the judgment below upon the alleged ground that "the appeal presents no substantial question". The motions were served upon appellant on March 31, 1947.

For appellant it is submitted that the claim that "the appeal presents no substantial question" is not well made; that substantial questions are raised; that these are questions which have not previously been adjudicated by this Court; and that the determination of these questions is of concern not only to appellant but to its patrons and to others engaged in various phases of the motor vehicle industry.

The Questions Presented

From appellant's assignment of errors and from its jurisdictional statement, it will be seen that the appeal presents questions with regard to two separate features of the decision and order of the Interstate Commerce Commission and of the decision of the court below.

1. The first question relates to appellant's so-called "contracts of rental without responsibility". Under these contracts appellant rents trucks owned by it to customers to be used by the latter in hauling their own goods. The present form of this type of contract, as the Commission found (Petition p. 57), provides

> "that Motor Haulage does not undertake to transport any of the shipper's goods, that it is not a bailee of such goods, and that it is under no liability with respect thereto".

The Commission determined that where vehicles only are leased and furnished under such contracts

> "These agreements are merely arrangements for the leasing of vehicles, and we conclude that applicant's status with respect to the operation of such vehicles while under lease is not that of a carrier subject to the act". (Petition pp. 21-22)

The Commission determined further, however, that if under these rental contracts appellant, at the request of a lessee, furnishes drivers to operate the vehicles pursuant to the instructions of the lessee, the drivers remaining upon appellant's payroll but appellant being reimbursed by the lessee for their wages, social security, etc., appellant becomes a carrier for hire subject to the provisions of the Interstate Commerce Act. This latter feature of the Commission's decision was challenged by appellant in its suit, and the first question presented by the appeal is whether or not the Commission's decision on this point was in error.

2. The second question presented by the appeal is whether the Commission erred as a matter of law, exceeded its authority, and acted contrary to and without support in the evidence in providing by its order that the permit to be issued to appellant to transport general commodities should contain the following limitation:

> "Limited to a service wherein motor vehicles, accompanied by drivers employed by applicant and who oper-

ate such vehicles, are assigned to shippers under continuing contracts, for the exclusive use of such shippers in transporting such shippers' property." (Petition p. 74)

It is submitted that appellant's challenge of the validity of these two features of the Commission's decision and order raises novel and substantial questions and that therefore this Court should not affirm the decision of the court below without hearing argument thereon.

ARGUMENT

I

Whether the Commission's decision that appellant becomes a carrier engaged in transportation subject to the Interstate Commerce Act when at the request of a lessee it supplies drivers to operate vehicles leased under a so-called contract of rental without responsibility is a substantial question.

The renting of motor vehicles, with or without drivers, to parties to do their own hauling of their own goods is an important part of the motor vehicle business. Nevertheless, so far as we can discover, the law is still in a state of doubt and there have as yet been no controlling decisions affording a guide as to whether and, if so, under what circumstances, an owner of trucks in renting them to patrons to transport their own goods becomes a carrier engaged in transportation subject to the provisions of the Interstate Commerce Act.

It is said in the motion of the United States and the Commission that "the question here is one of statutory interpretation and not one to be determined by the 'witty diversities' governing the common law concept of bailment." But certainly this does not support the claim that the question is without substance. For a question of the

interpretation of an act of Congress whose meaning on the point involved is in doubt and has not been the subject of authoritative court decision, is certainly a question of substance.

The provisions of the Interstate Commerce Act are applicable only to carriers. Before that statute, it was clearly the established law that a contract of carriage is a contract of bailment and that the first essential of carrier status is that one be a bailee of goods to be transported.

Hutchinson on Contracts, Third Edition, Section 1 says:

> "Every carrier of goods is a bailee; for their carriage necessarily presupposes the delivery of the goods for that purpose; * * *."

In 9 Am. Jur., Carriers, Section 1, it is said:

> "A carrier, according to the legal usage of the term, is one who undertakes to transport persons or property from place to place. A contract for the carriage of property is a form or species of bailment, and the law of carriers, in so far as the transportation of property is concerned, is a development and extension of this phase of the law of bailments."

It has not been held by the courts, nor do we believe that it should be, that the provisions of Part II of the Interstate Commerce Act make a party who is not a bailee a motor carrier for hire for the purposes of that statute. But whether or not the Act does have such effect is certainly a question of substance and not a mere toying with " 'witty diversities' governing the common law concept of bailment".

It is argued further by appellees that the fact that the contracts of rental without responsibility provide that appellant shall be under no liability for goods loaded in rented trucks raises no question of substance as to appellant's status. It may be agreed that within the limitations permitted by law a carrier may by contract relieve itself from liability so that, to that extent, the presence or absence of liability for goods is not necessarily the test of a party's

status under the Interstate Commerce Act. Appellees' contention on this point, however, merely begs the question to be decided and does not eliminate it as a question of substance. For Section 203(a)(15) of the Act defines a contract carrier as a person engaging in transportation "under individual contracts or agreements". This necessarily means contracts to transport. The question at issue, which appellees' argument does not dispose of, is whether a rental agreement, pursuant to which the lessee of a vehicle has the use of the vehicle to perform its own transportation, becomes a contract by the truck owner to transport and brings the owner-lessor within the definition of a contract carrier if, at the lessee's request, the owner furnishes a driver to operate the vehicle in accordance with the lessee's instructions. The contract provision for absence of liability becomes important, not as a limitation by a carrier subject to the Act of what would otherwise be its carrier responsibility, but because it raises the question whether, in the complete absence of any undertaking to transport goods or be responsible therefor, the contract really is an agreement for transportation, and the owner of the vehicle can be deemed a bailee or come within the definition of a contract carrier under the terms of the Act.

The cases cited on page 3 of the motion of the United States and Interstate Commerce Commission afford no authority to the contrary and lend no support to appellees' contention that the questions here are without substance. Indeed, *Cornell Steamboat Company* v. *United States*, 321 U. S. 634, and *Champlin Refining Co.* v. *United States*, 329 U. S. 29, provide strong precedent for consideration by the Court of the present appeal on its merits, since in both of these cases the Court heard argument and wrote opinions on questions analogous to the questions presented here. For in each of these cases the major issue was whether the activities of the appellant came within the definition of "transportation", as that term was employed in different parts of the Interstate Commerce Act. In the *Cornell Steamboat Company* case the question arose under Part III of the Act. The *Champlin* case turned upon the meaning of the term "transportation" in Part I.

Certainly the provisions of Part II of the Act are in equal need of interpretation and the questions here, whether furnishing drivers with rented truck constitutes "transportation" under Part II and whether the term "contract carrier" in Part II is to be construed to embrace an owner of motor vehicles who rents them and furnishes drivers under contracts similar to those of appellant merit equal consideration by the Court with the questions dealt with in the *Cornell Steamboat Company* and *Champlin* cases.

The decisions in *Thomson* v. *United States*, 321 U. S. 19, and *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, which are also cited by appellees, far from supporting the claim that no substantial question is presented here, do just the contrary by indicating error both in the reasoning of the Commission in its report and in the argument now made in support of the motions to affirm. The Commission, having held here that in supplying trucks under its contracts of rental without responsibility, appellant does not become a carrier if it does not furnish drivers, and in thus deciding in effect that the contracts are not in themselves contracts of transportation, has necessarily rested its conclusion that when drivers are furnished appellant becomes a carrier upon a belief that the fact that the drivers are appellant's employees raises a presumption that appellant has direction and control of the operation of the rented vehicles and that this gives rise to a status as a carrier under the Act. Both of the cases cited, however, are authority for the proposition that ownership of vehicles and employment of drivers does not create a presumption of carrier status within the terms of the Act. In these cases the vehicles were furnished to carriers who themselves contracted with shippers to perform transportation, and it was held that in the circumstances those using the trucks were the carriers for the purposes of the Act rather than those who owned the vehicles and employed the drivers. It may be suggested that the problem is different where, as here, trucks are rented not to carriers but to the owners of the goods to be used in performing their own transportation.

However, the Interstate Commerce Act itself specifically provides that an owner of goods may, for certain purposes of the Act, be a carrier of his own property subject to the Act. (Section 203(a) (17).) Hence, just as in the *Rosenblum* case this Court held that the law did not contemplate that both the owner of a motor vehicle and the party contracting for its use should be deemed carriers within the provisions of the Act, so it would seem here that the cases cited support appellant's contention that merely because it is the owner of the motor vehicles and employer of the drivers it is not to be deemed the carrier, but that the lessee-customer is a private carrier within the definition referred to. The conflict between such a conclusion and the Commission's decision here indicates that a substantial question is presented by the appeal.

Appellees argue further that there is no substantial issue here because "what constitutes transportation is an administrative question for determination by the Commission" and therefore its decision that appellant is engaged in transportation is conclusive and leaves no question for the courts. *Wabash R. R. Co.* v. *United States*, 321 U. S. 403, 407-8, is cited for this proposition.

That case, however, affords no authority for appellees' contention. The Wabash Railroad was admittedly a carrier subject to the Act. Starting from this premise, the question involved was whether or not the particular services performed by the Wabash constituted transportation under its line-haul rates and subject to the provisions of the Interstate Commerce Act. The Court said (p. 408):

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

This is far different from the question here as to whether a contract of rental is a contract to transport within the

meaning of the Act and whether the owner of rented equipment is or is not a carrier under the Act.

It is not without relevant bearing upon the substantial character of the question here discussed that under the Motor Carrier Act of New York, which is substantially identical with the Federal statute, the Public Service Commission of New York has reached a conclusion with regard to appellant's intrastate operations directly contrary to that of the Interstate Commerce Commission. When called upon to review the action of the Public Service Commission, the Court of Appeals of New York in *Matter of Motor Haulage Co.* v. *Maltbie*, 293 N. Y. 338, said as follows:

> "*Contracts of rental without responsibility.* Under these contracts, Applicant furnishes trucks, with or without drivers, to customers to be used by customers as they may see fit. Applicant assumes no responsibility for goods handled in the trucks. In some instances it agrees to furnish chauffeurs to operate the trucks. In other instances, the drivers are supplied by the lessee. When chauffeurs are furnished, Applicant is reimbursed by its patrons for their wages. As a general rule the contracts do not specify the nature of the commodities to be transported. The trucks are operated by the lessees in the same manner as if they were owned by them. Applicant usually agrees to maintain the leased equipment in good repair, to maintain personal injury and property damage insurance, and to garage and fuel the trucks. The lessee directs the operation of the vehicles. At the time of the hearings Applicant was a party to seven such contracts, three of which related to intrastate commerce in New York.
>
> "Applicant contended and the Commission has held that this type of contract does not constitute transportation subject to the Public Service Law and, therefore, is not subject to regulation by the Commission. Therefore, no issue is presented here as to that phase of the Commission's decision."

For all of these reasons, it is submitted that the first question presented by the appeal is one of substance and

that, consequently, the Court should not affirm the judgment below without hearing argument and considering the question on its merits.

II

Whether the limitations attached by the Commission to the grant of authority to transport general commodities are valid and supported by the evidence involves questions of substance.

In seeking to belittle the questions involved in the second feature of the Commission's decision and order which is challenged by appellant, namely, the limitations which the Commission would attach to the authority granted to appellant to transport general commodities, appellees rest their argument upon the proposition that

> "since the appellant was seeking a permit under the 'grandfather clause', * * * it was therefore the duty of the Commission to 'specify in the permit the business of the contract carrier covered thereby and the scope thereof,' as it existed during the 'grandfather' period."

As an abstract statement this proposition may be accepted, but its application here involves two assumptions which go to the very heart of the case and to the grounds for appellant's attack upon the Commission's order and the decision of the court below. The first assumption is that the limitation fairly and correctly describes the nature and scope of appellant's business as shown by the evidence. The second assumption is that the terms of the limitation are of a sort which under the law the Commission is empowered to attach to a permit in specifying "the business of the contract carrier covered thereby and the scope thereof" (Section 209(b)).

By the terms of the order, appellant's transportation of general commodities and its contracts therefor would be limited to a service "wherein motor vehicles * * * are as-

signed to shippers under continuing contracts, for the exclusive use of such shippers in transporting such shippers' property", as these terms were used by the Commission in its report. There are two features of this limitation to be noted. The first is that the vehicles are to be assigned to shippers "under continuing contracts". Whatever this term may mean, it apparently is intended to bar any contract for a single movement of goods for a particular shipper. The other feature is the requirement that the transportation be performed in vehicles assigned "for the exclusive use" of such shippers. The Commission defines this as meaning "that the traffic of two or more shippers may not be transported at the same time in the same vehicle."

The reports and orders of the Commission will be searched in vain for another instance where such limitations have been attached to authority granted by the Commission, a fact which in itself suggests serious question as to their validity.

Appellant vigorously challenges the asumption that the limitations are supported by the record or constitute a fair and correct description of the business in which appellant was engaged.

As to the limitation to "continuing contracts", the evidence shows, and the Commission itself found, that during the "grandfather" period and since then a small but nevertheless important feature of appellant's business has consisted of what was called its "miscellaneous business", which consists of the transportation of individual shipments under separate contracts negotiated by telephone and generally confirmed in writing. In their very nature these were not "continuing contracts". The District Court predicated its decision upholding the Commission's action in large part upon its deduction from the evidence that but little of appellant's miscellaneous business was conducted beyond the limits of the so-called exempt zone. It therefore concluded that the Commission's order would not interfere in any substantial way with appellant's operations as they were conducted during the "grandfather" period.

However, by the "grandfather" clause of the statute, the Commission was required to issue to appellant a permit which would authorize it to continue to engage in any business in which it was actually engaged during the "grandfather" period. That the miscellaneous business which appellant then conducted beyond the limits of the exempt zone was a relatively small proportion of its total operations does not negative the fact that it was a part of its business in which it was actually engaged. Under the proviso of Section 209(b), it was and is entitled to

> "add contracts within the scope of the permit, * * * as the development of the business and demands of the public may require."

The affidavit submitted in support of the continuance of the interlocutory injunction indicates that this must have happened, because it is stated that the limitation here discussed would interfere with an important part of appellant's business. There is, therefore, a substantial question whether, contrary to the "grandfather" clause, the Commission may attach a limitation which will bar appellant from continuing and expanding this phase of its business. Appellees' assertions in their motions only emphasize the necessity, in justice to appellant, of examining the record and the Commission's findings on this point. It is surely a substantial question whether the order is supported by the evidence on this point.

It is appellant's contention that the evidence likewise fails to support the limitation which would bar it from transporting the goods of two or more shippers "at the same time in the same vehicle". This was the very essence of the miscellaneous business just referred to. It was also an important feature in the efficient conduct of certain of appellant's operations under its long term contracts. In its second report the Commission found that there was testimony

> "to the effect that 'occasionally' the goods of two shippers may be loaded on the same vehicles for the same

> trip and that Motor Haulage in its contracts expressly reserved the right to do this when operating economy and efficiency make it desirable."

The Commission went on to say that there was

> "no showing that this was actually done in transporting shipments in interstate or foreign commerce prior to the statutory date." (Petition pp. 68-69)

In making this last statement, however, the Commission apparently overlooked the express finding in its earlier report that

> "Applicant has not been restricted from transporting the goods of other shippers in the same vehicles with liquors, and it has, in fact, performed such transportation." (Petition p. 27)

It also overlooked the significant distinction, expressly provided for in various contracts, between vehicles assigned for exclusive use and other vehicles. Moreover, various contracts expressly provided for the transportation of less-truckload quantities and some of them named charges upon a per crate, per drum or per package basis. Therefore, here too there is a substantial question as to whether the order is supported by the findings and the evidence.

Further than this, however, the appeal raises questions of law as to whether either of these restrictions is a type of limitation which the Commission is empowered to write into a permit in specifying the service in which a contract carrier is authorized to engage.

The statute (Section 203(a)(15)) defines the term "contract carrier by motor vehicle" as meaning

> "any person which, under individual contracts or agreements, engages in the transportation * * * by motor vehicle of passengers or property * * *."

There is nothing in this language which states that these "individual contracts" must be contracts for a series of movements or for a period of time, or whatever may be

meant by the term "continuing", as distinguished from contracts for single jobs.

Section 209 (b) of the Act provides further

> "That no terms, conditions, or limitations [attached to a permit] shall restrict the right of the carrier to substitute or add contracts within the scope of the permit * * * as the development of the business and the demands of the public may require."

Here again there is certainly nothing in the statute to suggest that the contracts, which the Act guarantees the right to substitute or add, are only "continuing contracts", and that a contract carrier may be barred from entering into a new "individual contract" for a single project.

Nor has it been held that the "scope of the permit" is properly to be defined in terms of the number of trips or number of days, months or years for which a carrier may contract, as distinguished from the points or territory within which the carrier may operate, the type of equipment it may use, the goods it may carry, or the classes of patrons it may serve, which have heretofore been the usual respects in which the "scope" of permits has been described.

Whether the Commission is empowered to limit a contract carrier's right to contract and to specify the terms and conditions of the contracts under which it may perform transportation, as would be done by the order whose validity is challenged in this action, is surely a question of substance.

Furthermore, there is here an obvious question whether the order is not void for vagueness. How many movements must a contract provide for, or for how long a period must a contract operate to be "continuing"? Whether the Commission is empowered thus to include such an indefinite term in an order, violation of which may be a penal offense, would seem to be a question of some importance.

As to the other limitation, appellant challenges the authority of the Commission under the statute, under the guise of specifying appellant's service, to limit the manner in which it may transport freight and to prohibit it from availing itself of economies in operation which may result from mingling the goods of several shippers on one truck where this can be done without interfering with the fulfillment of its contract obligations to the several shippers concerned. This matter is especially serious at the present time with the shortage of motor vehicle equipment.

Moreover, this limitation in preventing appellant from availing itself of opportunities for economies in its operations and efficient use of its equipment would appear to conflict with the Congressional declaration of the National Transportation Policy written into the Interstate Commerce Act by the Transportation Act, 1940, which declares it to be the National Transportation Policy that the provisions of the Act shall be so administered as

> "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation * * *."

It is submitted that these questions as to the scope of the Commission's authority which are raised by the appeal merit the considered judgment of the Court after hearing, brief, argument and review of the record, and that the Court should not summarily affirm the judgment below.

Conclusion

As shown in the affidavit in support of appellant's petition to continue the interlocutory injunction, the Commission's order would bar appellant from continuing important parts of its business, would prevent it from furnishing services to customers which in good faith it has contracted to provide, and would thus deprive appellant of revenue and its customers of transportation service or facilities for which they have contracted.

An order which will have this effect should be reviewed where there are, as here, substantial questions as to its validity.

The motions to affirm should, therefore, be denied or, at least, the Court should withhold action thereon pending argument and consideration of the appeal on the merits.

Respectfully submitted,

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Attorney for Appellant.

Dated: April 17, 1947.

Certificate of Service

I CERTIFY that copies of the foregoing brief in opposition to appellees' motions to affirm were this day mailed to all counsel for appellees.

Dated at New York, N. Y., this 17th day of April, 1947.

PARKER MCCOLLESTER,
Attorney for Appellant.